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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

ANGELO M. SEAVER et al., Plaintiffs and Appellants, v. COUNTY OF SANTA CRUZ, Defendant and Respondent.	H025884 (Santa Cruz County Super. Ct. No. CV143438)

Plaintiff, Angelo M. Seaver was 17 years old when he rode his skateboard down a driveway in a county park and slammed into a metal gate at the bottom. Plaintiff sued defendant, County of Santa Cruz (County) for the injuries he received, alleging that the unmarked gate was a dangerous condition of public property. (Gov. Code, § 830 et seq.)[1] The trial court granted summary judgment for County. We shall reverse.

A. UNDISPUTED MATERIAL FACTS

Anna Jean Cummings Park (the park) is owned and maintained by County. It is a relatively new park, having first opened to the public in 2001. The park is comprised of about 95 acres of sloping terrain. Because of the slope of the land the developed portion of the park was constructed on two levels. The lower level of the park contains a

[1] Unless otherwise specified, all further statutory references are to the Government Code.

playground, picnic area, and restrooms. The park's only marked entrance is located on the lower level, which fronts on Old San Jose Road.

Athletic fields are located on the much larger upper level. There is undeveloped open space on a hill behind and above the athletic fields. The undeveloped area is crisscrossed with trails and rough roads. A paved service path encircles the athletic fields. There are no fences separating the developed area of the park from the surrounding areas. There are no signs on the upper level identifying park property or park hours. A sign at the entrance on the lower level states that park hours are sunrise to sunset.

An asphalt driveway connects the two levels of the park. A metal gate at the bottom of the driveway is closed at sunset to prevent cars from entering the upper level at night and bothering the adjacent neighbors. The gate is approximately 37 to 40 inches high and is constructed of three-inch metal pipe painted green. At the time of the incident, there were no reflectors or signs on the gate, no warning signs uphill, and no lighting in the vicinity.

Soquel High School is located next to the park on Old San Jose Road. Old San Jose Road intersects Soquel Drive just to the south of the high school. There is a footpath leading from a point on Soquel Drive to the rear of the high school campus where it connects with the trails leading to the upper level of the park and the hillside above that. The general public had used these trails long before the park was built. County personnel testified that since the park's construction, people continue to walk and ride bicycles in the open space above the park.

On a moonless evening in January 2002, plaintiff and his friend had been out riding their skateboards. Plaintiff did not have a driver's license at the time. He used his skateboard for transportation. The skateboard was a "long board" that was designed for cruising, not for the tricks or jumps that are commonly associated with skateboarding. Plaintiff compared his board to a cruiser bicycle or a mountain bike. Plaintiff and his

friend were not doing tricks with their skateboards on the evening of the accident. They had been skating around from one end of town to the other. By around 10:00 p.m. they had become tired. They walked up the trail from Soquel Drive to the hills behind the park to kill some time while waiting for the next bus home. After smoking "a bowl" (of marijuana), plaintiff got on his skateboard and proceeded down the park driveway, intending to make his way to a bus stop on Old San Jose Road. Plaintiff picked up speed on the downhill slope of the driveway and slammed into the gate that was closed at the bottom of the incline. Plaintiff does not recall seeing the gate.

B. ISSUES

The trial court granted County's motion for summary judgment citing three alternative grounds: (1) No dangerous condition existed because plaintiff failed to use the property with due care in a reasonably foreseeable manner (§ 830, subd. (a)); (2) County is immune from liability because plaintiff was engaged in a hazardous recreational activity (§ 831.7); and (3) plaintiff's claims are barred by the primary assumption of the risk doctrine (*Knight v. Jewett* (1992) 3 Cal.4th 296 (*Knight*)).

Plaintiff argues on appeal that the trial court used the wrong legal standard in determining whether there was a dangerous condition, that there is a triable issue as to whether plaintiff's skateboarding was a hazardous recreational activity, and that the primary assumption of the risk doctrine does not apply.[2]

C. DISCUSSION

1. Standard of Review

Any party may move for summary judgment in an action if it is contended that the action has no merit. (Code Civ. Proc., § 437c, subd. (a).) A defendant seeking summary judgment bears the initial burden of proving the cause of action has no merit by showing

[2] Plaintiff also contends that the court erred in awarding costs against plaintiff's guardian ad litem. Because we reverse the judgment, we need not reach the issue.

that one or more of its elements cannot be established or there is a complete defense to it. Once the defendant does so, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists. (*Id*., at subds. (a), (p)(2).) On an appeal from summary judgment we review the record de novo. (See *Guz v. Bechtel National*, *Inc.* (2000) 24 Cal.4th 317, 334.) We accept as true the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them. (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1001.)

2. Dangerous Condition

The trial court's order granting summary judgment states, "No Dangerous Condition Existed Since Plaintiff Failed to Use the Public Property with Due Care In a Reasonably Foreseeable Manner." In support of its conclusion, the court cited evidence that plaintiff had entered the park after it was closed, that it was dark, that plaintiff had smoked marijuana within an hour of skateboarding down the driveway, and that he was not wearing any protective clothing. The court then stated: "Based on the undisputed facts of this case, this metal gate did not create a substantial risk of harm when the park was used with due care in a reasonably foreseeable manner." Plaintiff argues that the trial court improperly focused upon plaintiff's lack of due care, which is not material to the determination of a dangerous condition. We agree.

The Government Code defines "dangerous condition" of public property to mean "a condition of property that creates a substantial . . . risk of injury when such property . . . is used with due care in a manner in which it is reasonably foreseeable that it will be used." (§ 830, subd. (a).) In other words, whether a condition is dangerous depends upon how the general public would use the property exercising due care. The definition takes into consideration the standard of care applicable to all foreseeable users of the property, including children to whom a lower standard of care is applicable. (Cal. Law Revision Com. com. 32 West's Ann. Gov. Code (1995 ed.) foll. § 830, p. 298.) The standard is objective. The plaintiff's particular condition or use of the property is

irrelevant to a determination of whether the condition was dangerous. (*Schonfeldt v. State of California* (1998) 61 Cal.App.4th 1462, 1465-1466.) " '[W]hether a given set of facts and circumstances creates a dangerous condition is usually a question of fact and may only be resolved as a question of law if reasonable minds can come to but one conclusion.' " (*Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 810.)

There is ample evidence to support a finding that the general public using the park's upper level could choose to exit by way of the driveway without knowing that the gate at the bottom of the hill was closed. Some users might enter the park's upper level from the rear as plaintiff did. The upper level was surrounded by neighborhoods and the high school. People were known to walk and ride bicycles in the open space behind the upper level. Since there were no fences around the upper level, there was nothing stopping these users from also accessing the athletic fields and service path on the upper level. These users would have no notice that the gate would be closed because the gate was at the bottom of the driveway and the only sign indicating park hours was posted at the main entrance on the lower level. Although people who entered the upper level by way of the main entrance might be charged with knowing the park hours, it does not necessarily follow that they would know the gate was going to be closed between sunset and sunrise.

The evidence also supports plaintiff's contention that the design and placement of the gate made it difficult to see. When the gate is closed, there is no sign or light on the gate and no warning of any kind uphill from the gate so that those proceeding downhill would have to depend upon their ability to see the gate across the road in order to avoid crashing into it. The photographs show a dark colored metal gate that when viewed from above appears against and in part blends into the background of the dark asphalt

driveway.[3] Trees along the side of the driveway cast shadows across the asphalt uphill from the gate. A map shows that the driveway runs east to west. It is reasonable to infer that someone riding down the driveway at dawn could have the sun in his or her eyes; at dusk, the gate would be in the shadow of the hill above. In brief, it is reasonable to infer that the gate is difficult to see under various circumstances other than the dark of night. Since the gate at the bottom of the hill is difficult to see when it is closed, it could be considered a hidden danger presenting a substantial risk of injury to cyclists, skaters, and even possibly to joggers who choose to descend the driveway after the gate is closed at night or before it is opened in the morning.

County argues that plaintiff's suggested remedies (reflective tape, a "road closed" sign) all require illumination to be effective and, citing *Atenor v. City of Los Angeles* (1985) 174 Cal.App.3d 477, County points out that a public entity has no duty to install lighting on the public roadways. The argument is unavailing. First, as *Atenor* points out, some peculiar conditions may require lighting to make them safe. (*Id.* at p. 483.) And second, the gate presents a danger because people might not know it is there and because it is difficult to see due to its design, its color, and its placement. Any number of measures other than illumination could conceivably increase its visibility and a user's awareness of it.

County also seems to suggest that the danger is obvious so that there can be no dangerous condition of property. County cites *Mathews v. City of Cerritos* (1992) 2 Cal.App.4th 1380, 1385 in which the appellate court held that the danger of riding a bicycle down a "very steep, wet, grassy hill [was] obvious from the appearance of the

[3] County objected in its papers to the photographs on the grounds they lacked foundation and were not properly authenticated. County did not dispute that the photographs accurately depicted the gate and its surroundings. Counsel did not raise the objection at oral argument and the trial court did not rule on the written objection. We conclude that the objection was waived because counsel failed to obtain a ruling. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670.)

property itself . . . ." We reach the opposite conclusion. It is at least a triable issue whether the dangerousness of the condition was apparent. The gate was unmarked and difficult to see and it is foreseeable that users could approach it without knowing it was there.

The question remains whether riding, skating, or running down the driveway at a time when the gate would be closed demonstrates a lack of due care. County relies to a large extent upon the argument that use of the driveway outside of park hours would necessarily demonstrate a lack of due care. We are not persuaded. Park hours of "sunrise to sunset" are vague at best. There may well be times when the park is technically closed but there is sufficient light that riding, skating, or jogging without illumination would not be a lack of due care. Furthermore, given the proximity of the high school and the residential neighborhoods, it is reasonable to infer that many foreseeable users would be children, to whom a lower standard of care would apply. Arguably, a child of 11 or 12 who rides a bicycle down the driveway could be exercising the standard of care applicable to him or her even if it happened to be dusk.

The trial court impliedly determined that descending the driveway without a light at any time of day when the gate would be closed would not be an exercise of due care. We are of the view that reasonable minds could differ on the point, particularly considering the foreseeability of child users. We conclude that the trial court erred in holding that the condition (i.e., the unmarked, green, metal gate) was not a dangerous condition as a matter of law.

3. Hazardous Recreational Activity

A public entity is immune from liability for injuries sustained as a result of participation in a hazardous recreational activity. (§ 831.7.) A "hazardous recreational activity" is "recreational activity . . . which creates a substantial . . . risk of injury to a participant or a spectator." (*Id.* at subd. (b).) The statute contains a list of activities it expressly covers. The list includes: "bicycle racing or jumping, mountain bicycling,

boating, cross-country and downhill skiing." Riding a bicycle on paved pathways is expressly exempted from the definition. (*Id*. at subd. (b)(3).) There is no reference to riding skateboards.

The trial court found that "skateboarding is a hazardous recreational activity since it is more akin to cross-country and downhill skiing (specified in § 831.7 as hazardous recreational activities), rather than bicycling. This is because bicycles are equipped with brakes and lights (required by Vehicle Code § 21201), unlike skis and skateboards, and skateboarding 'is done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury.' [Citation.]" In our view, the question is one of fact.

As noted, section 831.7 does not refer to riding a skateboard. Health and Safety Code section 115800, which establishes requirements for skateboard parks, specifies that skateboarding in a skateboard park is a hazardous recreational activity within the meaning of section 831.7 only if the skateboarder is 14 years of age or older and the activity that caused the injury was a stunt, trick, or luge skateboarding.[4] (Health & Saf. Code, § 115800, subd. (d).) Thus, using a skateboard to get from one place to another without tricks or stunts is not a hazardous recreational activity within the express terms of these two relevant statutes. A 1998 Attorney General Opinion concluded that skateboarding outside a skateboard park could be considered a hazardous recreational activity within the meaning of section 831.7, but that it would depend upon the circumstances. (81 Ops.Cal.Atty.Gen. 331 (1998).)

We concur with the Attorney General's Opinion that the determination of whether riding a skateboard is a hazardous recreational activity depends upon the circumstances.

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[4] We presume that luge skateboarding resembles the sport of luge where the participants lie on their backs on a sled. (See Webster's II New Riverside Univ. Dict. (1984) p. 708, col. 1.)

County presented evidence that defendant skated down the dark driveway after smoking marijuana and without wearing any protective gear. County did not present any evidence that plaintiff was attempting any tricks or stunts. County's motion more or less presumed that riding a skateboard was the type of activity to which the immunity applied. In opposition, plaintiff explained that his long board was not the type of skateboard that is used for tricks.[5] He was using it on the night of the accident to get around town and he was riding it to the bus stop when he was injured. In other words, he was not using the board for a recreational purpose. And although one could conclude, as the trial court did, that the lack of brakes makes riding a skateboard more hazardous than riding a bicycle, that alone does not make the activity a hazardous recreational activity. Assuming that County's showing was sufficient to shift the burden to plaintiff, plaintiff succeeded in demonstrating a triable issue of fact as to whether the immunity of section 831.7 should apply.

4. Primary Assumption of the Risk

The trial court found that plaintiff's claim was barred by the doctrine of primary assumption of the risk. Where it applies, primary assumption of the risk is a complete bar to recovery. It is a policy-driven legal concept where the court declares that the defendant had no duty at all. (See *Knight*, *supra*, 3 Cal.4th at p. 308.) The doctrine is different than secondary assumption of the risk, which involves the situation where the defendant owes a duty to a plaintiff who voluntarily encounters a known risk created by the defendant's breach. (*Ibid.*) Secondary assumption of the risk "is merged into the

[5] Plaintiff submitted the declarations of two persons involved in the skateboarding business as additional evidence on the issue but the trial court ruled that the declarations were inadmissible. We need not reach plaintiff's argument that the trial court erred in this regard because we find plaintiff's own deposition testimony sufficient to raise a triable issue.

comparative fault scheme, and the trier of fact, in apportioning the loss resulting from the injury, may consider the relative responsibility of the parties." (*Id.* at p. 315.)

When the facts are not disputed, application of the doctrine of primary assumption of the risk is a legal question to be decided by the court. (*Record v. Reason* (1999) 73 Cal.App.4th 472, 479.) The court must determine, as a matter of law, whether "by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury." (*Knight*, *supra*, 3 Cal.4th at pp. 314-315.)

Primary assumption of the risk applies to activities of a sports nature such as football, water skiing, gymnastics, and sport fishing. (See *Moser v. Ratinoff* (2003) 105 Cal.App.4th 1211, 1220-1221 [collecting cases].) Application of the doctrine advances the notion that where a person is playing an active sport, others involved in the activity should not be liable for injuries caused by risks that are inherent in the sport. Where the doctrine applies, liability will attach only if the defendant's conduct has increased the risk of harm. (*Shannon v. Rhodes* (2001) 92 Cal.App.4th 792, 796.) The overriding concern is to avoid imposing a duty that " 'might chill vigorous participation in the implicated activity and thereby alter its fundamental nature. [Citation.]' " (*Regents of University of California v. Superior Court* (1996) 41 Cal.App.4th 1040, 1046.) Where this purpose of the doctrine is not implicated, the doctrine does not apply. (*Shannon v. Rhodes, supra,* 92 Cal.App.4th at p. 796 [passenger in a pleasure boat]; *Bush v. Parents Without Partners* (1993) 17 Cal.App.4th 322 [recreational dancing].)

Many sports and sports-related activities involve a challenge, thrill or risk that could not exist if vigorous participation were discouraged by the specter of legal liability. (*Knight*, *supra*, 3 Cal.4th at p. 318.) Thus, the doctrine of primary assumption of the risk has evolved to encompass any activity that is " 'done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury.' " (*Bjork v. Mason* (2000) 77 Cal.App.4th 544, 550.) An activity

that is subject to the doctrine necessarily matches a participant's physical skill, strength or agility against another competitor or against some other standard of performance such as a high score or a low time, and necessarily includes some element of danger. (See *Shannon v. Rhodes*, *supra*, 92 Cal.App.4th at p. 797.)

We have found no cases applying the doctrine to the use of a skateboard in the manner plaintiff used his skateboard here. Two cases involving similar activities are distinguishable. *Calhoon v. Lewis* (2000) 81 Cal.App.4th 108 applied the doctrine where the plaintiff had skated around a friend's driveway doing skateboard tricks. On his second attempt to complete an "ollie" (a trick in which the skateboard briefly becomes airborne) he lost control and impaled himself on a metal pipe in the planter box in the driveway. (*Id*. at p. 111.) Here plaintiff did not do stunts or tricks on his skateboard.

In *Moser v. Ratinoff*, *supra*, 105 Cal.App.4th at page 1215 the plaintiff was injured during the "Death Valley Double Century," an organized, 200-mile, noncompetitive bicycle ride on public highways. *Moser* noted: "It is true that bicycle riding is a means of transportation-as is automobile driving. Normal automobile driving, which obviously is not an activity covered by the assumption of risk doctrine, requires skill, can be done for enjoyment, and entails risks of injury. But organized, long-distance bicycle rides on public highways with large numbers of riders involve physical exertion and athletic risks not generally associated with automobile driving or individual bicycle riding on public streets or on bicycle lanes or paths." (*Id.* at p. 1221.) In the present case, plaintiff was not engaged in an organized challenge involving the physical exertion and athletic risks of an organized endurance ride. His use of the skateboard was more like individual bicycle riding, going from place to place around town.

The closest case we have uncovered is *Childs v. County of Santa Barbara* (2004) 115 Cal.App.4th 64 (*Childs*), which involved the plaintiff's use of a scooter on a public sidewalk. The trial court in *Childs*, like the court in this case, held that primary assumption of the risk barred the plaintiff's claim against the public entity that owned and

maintained the sidewalk. The appellate court reversed, explaining: "Riding a scooter may be subject to the doctrine under some circumstance, but we cannot conclude, as the trial court did, that riding a scooter is a recreational activity subject to the doctrine under all circumstances. Based on the undisputed facts, applying the assumption of risk doctrine to simply riding a scooter on a residential sidewalk would not further the purpose of the doctrine to protect sports and sports-related activities from the chilling effect of liability for injuries caused by inherent risks in the activity. To the contrary, it might chill the riding of scooters and other wheeled toys, a result which would not be consistent with the purpose of the doctrine. [Citation.]" (*Id.* at p. 71.)

Childs went on to explain that the evidence established only that the plaintiff was riding a scooter on a residential sidewalk and fell as she rode over a break in the sidewalk. "The County offered no evidence that she was riding at any particular speed, or with other children in a structured or unstructured contest such as a race, or was testing the limits of her ability or the scooter, or that she was attempting any trick or maneuver requiring skill. Based on the evidence, [the plaintiff] may have been engaged in no more than the diversion of getting from one place to another through the use of a child's toy with wheels." (*Childs*, *supra*, 115 Cal.App.4th at p. 71.)

Although we do not necessarily equate plaintiff's skateboard with a child's toy, the policy implications are the same. Defendant rode his skateboard around town the night of the accident to get from one place to another. After stopping for a time at the upper level of the park, he rode it down the hill to go to the bus stop. There was no evidence he was performing tricks and no evidence that he was testing his limits. As the *Childs* court noted: "riding a scooter on the sidewalk is not inherently dangerous merely because a scooter rider might fall and suffer injury." (*Childs*, *supra*, 115 Cal.App.4th at p. 73.) The same may be said of riding a skateboard. "The possibility that any person who rides a scooter, bicycle or other wheeled vehicle might be injured by the negligence

of another is insufficient to impliedly excuse others from acting with due care to avoid accidents." (*Ibid.*)

We conclude that the primary assumption of the risk doctrine does not apply on the facts in the record before us. Although County produced evidence to show that plaintiff's conduct increased the risk he would be injured, such evidence pertains to plaintiff's comparative fault-a question for the jury.

D. DISPOSITION

The judgment is reversed. The superior court is directed to vacate its order granting County's motion for summary judgment and to enter a new order denying the motion for summary judgment.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.